



HR AFFILIATES

GETTING BACK TO BUSINESS

CONSIDERATIONS FOR GETTING YOUR WORKFORCE BACK TO BUSINESS AS USUAL

Just as quickly as our companies were sent home to work, we are now quickly working to put together a plan to get everyone up and running again. There are a number of questions companies have about the best way to do this. We've reviewed resources from the CDC, EEOC, OSHA, and our friends at Fisher and Phillips law to put together the following recommendations to help you get your workforce back to business.

Everyone is eager to get back to work and to get the US economy the momentum it needs to start returning to normal. However, inability to test all employees, uncertain childcare solutions, and broken supply chains will likely make the decisions on when to get back to work difficult to make. The opening of businesses will certainly happen in waves and return to work efforts will be a gradual process – there will not be a “let’s get everyone back to work day”. Employers also need to consider the balance between getting up and running as soon as possible with the problem of putting employees at risk by returning too soon. Employers who rush employees back to the job site will likely face a reduced morale from their employees who feel it is not a safe practice. There is a lot to consider to safely and effectively implement return to work, and time to make many of these decisions is now.

CONSIDERATIONS FOR RETURNING YOUR EMPLOYEES TO WORK

While the need to stop on site operations had to be navigated quickly with many adjustments along the way, bringing employees back to a safe workplace needs to be thought out well, and now’s the time to do so. Everyone is eager to get our businesses and economy back up and running, but it will not be a matter of telling everyone to come back in on a Monday and get started. Developing a ramp up plan now -- and communicating it to your employees -- will help you significantly when the time comes.

Here are things to consider when bringing everyone back:

WHAT ARE THE PHASES FOR THE RETURN TO WORK FOR THE “OPENING UP AMERICA AGAIN” PLAN OUTLINED BY THE PRESIDENT?

1. Phase 1
 - a. Can be implemented when 3 “gating” factors are met in a region/community
 - i. a downward trajectory of influenza-like illnesses and COVID-like syndromic cases reported in the area within a 14-day period,
 - ii. a downward trajectory of documented cases and positive tests as a percentage of total tests within a 14-day period (with a flat or increasing volume of tests),

- iii. area hospitals need to be in a position to treat all patients without crisis care and have a robust testing program in place for at-risk healthcare workers,
- iv. You should continue to follow the recommendations issued by state and local health departments when determining the most appropriate actions to take.
- b. During Phase 1, employers are encouraged to follow these five steps:
 - i. Continue to encourage remote work and telework whenever possible and feasible with business operations.
 - ii. If possible, return to work in phases.
 - iii. Close common areas where personnel are likely to congregate and interact or enforce strict social distancing protocols.
 - iv. Minimize non-essential business travel and adhere to CDC guidelines regarding isolation following travel.
 - v. Strongly consider special accommodations for workers who are members of a vulnerable population. For purposes of this guidance, these include elderly individuals and those with serious underlying health conditions, including high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy.
- c. There are industry-specific considerations for Phase 1:
 - i. Schools: Those currently closed should remain closed during Phase One. This also includes organized youth activities (daycare, camps, etc.).
 - ii. Healthcare: Hospitals and senior living facilities should prohibit visits, and those interacting with residents and patients must adhere to strict protocols regarding hygiene. However, elective surgeries can resume, as clinically appropriate, on an outpatient basis at facilities that adhere to Centers for Medicare & Medicaid Services (CMS) guidelines.
 - iii. Hospitality: Sit-down dining establishments can operate under strict physical distancing protocols. This also includes other large venues such as movie theaters and sporting venues. However, bars should remain closed.
 - iv. Miscellaneous: Places of worship can reopen during Phase One under strict physical distancing protocols. Gyms can do the same, but also must adhere to strict sanitation protocols.

2. Phase 2

- a. Phase 2 is recommended to be implemented in areas where there is no evidence of a rebound in COVID-19 cases, and that satisfy the Phase One gating criteria a second time. You should continue to follow the recommendations issued by state and local health departments when determining the most appropriate actions to take.
- b. Phase 2 has the following recommended steps:
 - i. Continue to encourage remote work and telework whenever possible and feasible with business operations.
 - ii. Continue to close common areas where personnel are likely to congregate and interact or enforce moderate social distancing protocols.
 - iii. Businesses can resume non-essential business travel.

- iv. Continue to consider special accommodations for workers who are members of a vulnerable population. Encourage remote work and telework whenever possible and feasible with business operations.
- c. Industry specific considerations include:
 - i. Schools: Schools and organized youth activities (daycare, camps, etc.) can reopen during Phase Two.
 - ii. Healthcare: Hospitals and senior living facilities should continue to prohibit visits, and those interacting with residents and patients must continue to adhere to strict protocols regarding hygiene. However, elective surgeries can continue to resume, as clinically appropriate, on an outpatient basis at facilities that adhere to Centers for Medicare & Medicaid Services (CMS) guidelines.
 - iii. Hospitality: Sit-down dining establishments can operate under moderate physical distancing protocols. This also includes other large venues such as movie theaters and sporting venues. Bars can reopen with diminished standing-room occupancy where applicable and appropriate.
 - iv. Miscellaneous: Places of worship can remain reopen during Phase Two of the plan, this time under moderate physical distancing protocols. Gyms can remain reopen, however, must maintain strict physical distancing and sanitation protocols.
- 3. Phase 3
 - a. States and regions that have no evidence of a rebound of COVID-19 cases, and who satisfy the gating criteria a third time may enter Phase Three. You should continue to follow the recommendations issued by state and local health departments when determining the most appropriate actions to take.
 - b. Most employers can resume unrestricted staffing of worksites.
 - c. Industry considerations will include:
 - i. Schools: Schools and organized youth activities (daycare, camps, etc.) can remain open during Phase Three.
 - ii. Healthcare: Hospitals and senior living facilities can permit visits during Phase Three. Those interacting with residents and patients must be diligent regarding hygiene.
 - iii. Hospitality: Sit-down dining establishments can operate under limited physical distancing protocols. This also includes other large venues such as movie theaters and sporting venues. Bars can reopen with increased standing-room occupancy where applicable.
 - iv. Miscellaneous: Places of worship can remain reopen during Phase Three of the plan, this time under limited physical distancing protocols. Gyms can remain reopen provided they adhere to standard sanitation protocols.

ONCE CRITERIA IS MET FOR US TO REOPEN, WHAT DO WE NEED TO DO?

You should continue to follow the recommendations issued by state and local health departments when determining the most appropriate actions to take. According to the CDC guidance, you should consider three questions when deciding whether to reopen:

1. Are you in a community no longer requiring significant mitigation?

2. Will you be able to limit non-essential employees to those from the local geographic area?
3. Do you have protective measures for employees at higher risk (e.g. teleworking, tasks that minimize contact)?

You should only consider reopening if you can answer “yes” to each of the three questions. Even if you can satisfy the three preliminary questions, you should only reopen if these CDC’s recommended safety actions are in place:

- Promoting healthy hygiene practices,
- Intensifying cleaning and disinfection (e.g., small static groups, no large events),
- Canceling non-essential travel, and encouraging alternative commuting and telework,
- Spacing out seating (more than 6 feet) and staggering gathering times,
- Restricting use of any shared items and spaces, and
- Training all staff in above safety-actions.

The CDC also recommends that you only reopen after you have implemented safeguards for the ongoing monitoring of employees, which includes:

- Encouraging employees who are sick to stay home,
- Establishing routine, daily employee health checks,
- Monitoring absenteeism and having flexible time of policies,
- Having an action plan if a staff member gets COVID-19,
- Creating and testing emergency communication channels for employees, and
- Establishing communication with state and local health authorities.

IS THERE A CHECKLIST FOR GETTING BACK TO WORK?

While there is no official checklist for what you need to do to get your team back to work, the following are steps to consider:

1. Your Strategy
 - a. Identify individuals with clear roles and responsibilities which includes members from key functions.
 - b. Have policies and procedures determined and written for several issues identified in this FAQ.
 - c. Consider what policies you currently have in place that may need to be revised under current conditions, such as
 - i. Attendance
 - ii. Time off policies
 - iii. Remote work
 - iv. Work hours and lunch/break times
 - v. Time clock procedures
 - vi. Leave policies
 - vii. Travel policies
 - viii. IT technology and use
2. Communication and Training

- a. Communicate to your employees so that they know when to return, and what to expect when they return.
 - b. Take extra steps in communicating to your managers and supervisors so that they are prepared to answer questions from their employees.
 - c. Communicate with contractors, vendors, and clients to advise of your new workplace rules.
 - i. Your start up may especially need to be coordinated with vendors to make sure that they are able to supply the materials you need in accordance with their own ramp up plans.
 - d. Make sure your required FFCRA posters are in place, as well as any other communication to encourage the new protocols for distancing and hygiene.
3. Establish Safety Protocols
- a. Social distancing rules for work areas and common areas such as restrooms, employee entrances and exits, vending/food service, conference rooms, and break areas
 - 1. Can you stagger work shifts/office time so that your teams are there in groups, and not all at once?
 - 2. Can you identify positions that are critical to be on site, and those that can continue to work remotely for a period of time?
 - 3. Can you use barriers to protect people? Perhaps taller cubicle walls or plexiglass barriers between workstations.
 - 4. While implementing the 6-foot social distancing space, is it also possible to limit spaces the employees can use? While ideally employees will spread out, if there are spaces that are not suitable for work stations or are not necessary, you may want to eliminate access to them to prevent more space that could hold germs and need to be routinely disinfected (for example, you may not need to implement conference rooms right now since you are avoiding gathering in groups; if you have a workout or gym space available, consider not opening that until later.) Likewise, close off any areas where employees are likely to congregate, such as break areas or lunchrooms. Of course, employees will need access to lunch, so if there is no personal space at which they can eat, consider what can be done to reduce the traffic in the common area at one time – separate tables or reduce the number of tables for example. Also, provide supplies for sanitizing all appliances and surfaces.
 - a. Also consider:
 - i. Partitions between receptionists and others that may directly interact with the employees,
 - ii. Separating employees who work in adjacent cubicle spaces,
 - iii. Removing every other chair in break areas and lunchrooms,
 - iv. Adding partitions to tables where employees congregate during breaks,
 - v. Requiring employees to walk in designated one-way lanes in hallways and corridors to avoid “head-on” pedestrian traffic,
 - vi. Converting communal restrooms to single-seat bathrooms (or post signs that only one person at a time allowed in communal restrooms, depending upon space available at sinks for washing; also consider “closing” some urinals to allow more space between users) to avoid close contact between users,

- vii. Utilizing HVAC contractors to increase the number of air changes in your workplace,
 - viii. Arrange for food trucks or other food delivery services to serve employees outside to separate employees during lunch breaks,
 - ix. Providing hand sanitizer stations outside each restroom and each door that is commonly touched or used,
 - x. Upgrading your teleconference equipment to allow for more teleconferences, and
 - xi. If possible, arrange for pick-up and drop-off delivery of packages to be done outside.
- b. Any required PPE
 - c. Visitor access, including contractors, clients, vendors, and guests
 - d. Response to positive cases or symptoms
4. Protocols for cleaning and disinfecting (see below)
 5. Screening measures to maintain a health workforce (see below)

WHAT DO WE NEED TO IMPLEMENT FOR SANITATION PROCEDURES?

The CDC just released guidance for cleaning and disinfecting public spaces, workplaces, businesses, schools, and homes. You should review this guidance when implementing your cleaning procedures.

The CDC's guidance provides that for outdoor areas, you should maintain existing cleaning practices because viruses are killed more quickly by warmer temperatures and sunlight. For indoor areas, the CDC recommends normal, routine cleaning for areas that have been unoccupied within the last seven days. For indoor areas that have been occupied within the last seven days, the CDC recommends that frequently touched surfaces and objects made of hard and non-porous materials (glass, metal, or plastic) be cleaned and disinfected more frequently. Frequently touched surfaces and objects made of soft and porous materials, such as carpet, rugs, or material in seating areas, should be thoroughly cleaned or laundered. If possible, the CDC recommends considering removing soft and porous materials in high-traffic areas. Surfaces and objects that are not frequently touched should be cleaned on a routine basis.

To clean and disinfect:

- If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection (Note: "cleaning" will remove some germs, but "disinfection" is also necessary).
- For disinfection, diluted household bleach solutions, alcohol solutions with at least 70% alcohol, and most common EPA-registered household disinfectants should be effective.
- Diluted household bleach solutions can be used if appropriate for the surface. Follow manufacturer's instructions for application and proper ventilation. Check to ensure the product is not past its expiration date. Never mix household bleach with ammonia or any other cleanser. Unexpired household bleach will be effective against coronaviruses when properly diluted.
- Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash.

- Gloves and gowns should be compatible with the disinfectant products being used.
- Additional PPE might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash.
- Follow the manufacturer's instructions regarding other protective measures recommended on the product labeling. Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area. Be sure to clean hands after removing gloves.
- Employers should develop policies for worker protection and provide training to all cleaning staff on site prior to providing cleaning tasks. Training should include when to use PPE, what PPE is necessary, how to properly don (put on), use, and doff (take off) PPE, and how to properly dispose of PPE.
- If a position requires gloves or masks or other PPE, prepare a simple half-page Job Safety Analysis (JSA): list the hazards and the PPE (gloves, masks, etc., as needed), and the person who drafts the JSA should sign and date it.

KEEP MATERIAL DATA SAFETY SHEETS IN MIND

If you are using cleaners other than household cleaners with more frequency than an employee would use at home, you must also ensure workers are trained on the hazards of the cleaning chemicals used in the workplace and maintain a written program in accordance with OSHA's Hazard Communication standard (29 CFR 1910.1200). Simply download the manufacturer's Safety Data Sheet (SDS) and share with employees as needed, and make sure the cleaners used are on your list of workplace chemicals used as part of the Hazard Communication Program (which almost all employers maintain).

HOW DO WE COMMUNICATE ALL OF THESE REQUIREMENTS TO OUR EMPLOYEES?

A written communication to employees prior to return to work which outlines all the steps being taken, and those required of the employees, is an excellent way to communicate your commitment to their safety. Also consider training employees and demonstrating the new safety measures in place to protect them from further spread of the virus. The more employees understand about what safety measures are being taken, and why, the more likely there is to be employee buy-in, and the less likely that employees may make complaints to OSHA or other third parties regarding perceived risk in the workplace, such as the hotlines that have been set up in many states. If an employee does complain, be sure to take the complaint seriously, and do not allow any retaliation against employees who make complaints in good faith.

DO YOU HAVE EMPLOYEES WHO WILL NOT BE ABLE TO RETURN TO WORK DUE TO BEING AT-RISK OR HAVING CHILDREN AT HOME WITH NO ACCESS TO CHILD CARE?

You may need to take consideration that even if you are able to successfully maintain social distancing you may have employees who are unable to work due to being in a higher risk category for the virus. These individuals may need to continue to work remotely until we reach another phase in the recovery process.

Additionally, childcare is going to continue to be a challenge as large group centers and camps may not be allowed to resume for a period of time. Likewise, if parents rely on grandparents or other caregivers that are in an at-risk

category it may not be available. These employees may need to continue to work from home or have opportunities for shifts that alternate with another available caregiver in the household if one is available.

HOW CAN YOU REDUCE PEOPLE TRAFFIC TO EMPLOYEES ONLY?

Consider:

- If you typically interact with the public, is there a way for this to continue to be remote while your employees resume business?
- Will you allow employees to go to other companies, vendors, or clients? Or continue to conduct remote meetings for a period of time?
- What will you communicate to your clients?

Whatever you choose to do, you must ensure that any guests to your worksite are healthy in order to protect your employees. If your employees are required to work at a third-party's site, ask them to confirm in writing that CDC and OSHA COVID-19 guidelines are being followed prior to allowing your employees to work there.

CAN WE REQUIRE EMPLOYEE TO DISCLOSE COVID-19 RELATED SYMPTOMS? WHAT ABOUT THEIR FAMILIES?

If an employee begins experiencing COVID-19 symptoms at work, you should require the employee to notify their supervisor. If an employee begins experiencing symptoms while not at work, has been exposed to someone that is exhibiting symptoms, or has tested positive, the employee should contact your company by telephone or email and should not report to work. Employees who are suffering from symptoms should be directed to remain at home until they are they are released by a medical provider or, if that is not an option, symptom-free for at least three days without fever, achieved without medication, and no respiratory issues, and a minimum of seven days after symptoms first appeared.

CAN WE ASK EMPLOYEES IF THEY HAVE SYMPTOMS?

You are encouraged to not let employees with symptoms return to work unless they have been cleared by a medical provider. Certainly, there are going to be a number of people with seasonal allergies or the common cold who will exhibit similar symptoms; however, at this time it is best to err on the side of caution and require employees who are symptomatic to provide a release to work by a physician. The CDC recommends that you continue to monitor the health of all employees, including asking about presenting symptoms and taking temperatures in a way that is non-invasive.

Note, a return to work statement from a physician is not the same as a "fitness for duty" exam. The release to return to work will only address the prior presenting symptoms. You cannot request a full fitness for duty exam in this instance.

CAN WE TAKE THEIR TEMPERATURE?

Until further notice, you may continue to operate under the EEOC's guidance, which confirms that measuring employees' body temperatures is permissible. You should use a real-time thermometer and

immediately inform employees if their temperature is above 100.4 degrees Fahrenheit in a private setting.

To protect the individual who is taking the temperature, you must first conduct an evaluation of reasonably anticipated safety and health hazards and assess the risk to which the individual may be exposed. The safest thing to do would be to assume the testers are going to be exposed potentially to someone who is infected who may cough or sneeze during their interaction. Based on that anticipated exposure, you must then determine what mitigation efforts can be taken to protect the employee by eliminating or minimizing the hazard, including PPE. Different types of devices can take temperature without exposure to bodily fluids, and it is best to use a noninvasive tool such as this (forehead scan or remote thermal scan). Further, the tester could have a face shield in case someone sneezes or coughs

Note: If your company does business in the State of California (e.g., if you have one or more locations, employees, customers, suppliers, etc. in the state), and your business is subject to the California Consumer Privacy Act (CCPA), there are particular requirements about collecting this information.

WILL WE TRIGGER ANY HIPAA OBLIGATIONS IF WE COLLECT MEDICAL DATA SUCH AS TEMPERATURES?

The privacy restrictions mandated by HIPAA only apply to “covered entities” such as medical providers or employer-sponsored group health plans, and then only in connection with individually identifiable health information. Employers are not covered entities, so if you have medical information in your employment records, it is not subject to HIPAA restrictions. Nevertheless, disclosures should be made only to authorized personnel, and care should be taken even in disclosures to government personnel or other groups such as the Red Cross. Further, you should be careful not to release information to someone until you have properly identified them.

CAN WE REQUIRE THEM TO LEAVE IF THEY HAVE A FEVER OR OTHER SYMPTOMS?

CDC states that employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace. Check in with all employees on a regular basis to ask about their well-being. This is especially important for those who are home sick or in self-isolation. Your efforts to engage employees will prove beneficial during this time.

WHAT DO WE DO IF WE HAVE AN EMPLOYEE WHO TESTS POSITIVE?

Follow the same process that has been encouraged from the beginning – that is, put that employee on leave and do not permit return until they have a release from their physician or, if that is not an option, symptom-free for at least three days without fever, achieved without medication, and no respiratory issues, and a minimum of seven days after symptoms first appeared.

Also, have the employee identify all individuals with whom they have worked in close proximity (within 6 feet) during a time period prior to symptoms. Then, advise these individuals that they have come in contact with someone who has tested positive (without revealing the name of the individual) and send them home for a quarantine period of 14 days.

IF THEY SAY THEY CONTRACTED COVID-19 AT WORK, DO WE PUT THIS ON OUR OSHA LOG?

OSHA has published guidance on this issue and the answer is Yes. OSHA recordkeeping requirements mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log. You must record instances of workers contracting COVID-19 if the worker contracts the virus while on the job. The illness is not recordable if worker was exposed to the virus while off the clock.

You are responsible for recording cases of COVID-19 if:

1. The case is a confirmed case of COVID-19 (meaning an individual has at least one respiratory specimen that tests positive for SARS-CoV-2, the virus that causes COVID-19);
2. The case is work-related (as defined by 29 CFR § 1904.5); and
3. The case involves one or more of the general recording criteria as outlined by OSHA: if it results in death, days away from work, restricted work or transfer to another job, medical treatment beyond “first aid,” or loss of consciousness (OSHA provides a specific and complete definition of “first aid” in 29 CFR § 1904.7(b)(5)(ii))

OSHA recently published guidance for enforcing their recordkeeping requirements for cases of COVID-19. Recognizing the difficulty in determining whether COVID-19 was contracted while on the job, OSHA will not enforce its recordkeeping requirements that would require employers in areas where there is ongoing community transmission to make work-relatedness determinations for COVID-19 cases, except where:

1. There is objective evidence that a COVID-19 case may be work-related; and
2. The evidence was reasonably available to the employers.
3. Note: This waiver of enforcement does not apply to employers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting and law enforcement services), and correctional institutions in areas where there is ongoing community transmission. These employers must continue to make work-relatedness determinations.

EMPLOYEE QUESTIONS TO ANTICIPATE

CAN I KEEP WORKING AT HOME?

Working from home was a common request for many employers even before the pandemic. Often, employers would have a general policy that telecommuting was not a policy, and many employers might continue maintaining this policy after the social restrictions are lifted. However, the previous argument that “we aren’t able to work remotely” has been made invalid by the creative work routines that have been put in place in the recent months. Employees will likely push back if you tell them that you can’t do it. Also consider that many families may not be able to find the childcare programs they are accustomed to; while some restrictions will likely be lifted in the near

future, we can't expect that everything will go back to normal overnight. Camps and trips to grandparents may not be available for quite some time. Now's the time to consider your work from home policy and how you can continue the processes you implemented in the emergency.

DO I GET ANY MORE PTO SINCE I HAD TO USE IT DURING MY LEAVE?

The social distancing requirement has had an impact on employees and their use of paid time off. While the mandated paid leaves helped them with this, there may be employees who elected to use PTO rather than taking 2/3 wages. Other employees may have needed to be off longer than the leave allowed, or maybe needed time off for reasons that were not covered under the FFCRA (perhaps they lost their relied upon public transportation as routes were reduced, or perhaps they carpooled with someone else and lost that opportunity while they were quarantined). So, if you have a person who has used all their PTO, will they have the ability to take any additional time off the remainder of the year, and will this be paid or unpaid? You can certainly adjust your PTO policies for a brief period to accommodate needs, and then resume at the beginning of the year. To creatively help your employees during this journey back to normal, you can consider allowing employees to donate time to an emergency bank for colleagues who have to miss work, make a donation to their PTO bank for sick time, or allow them to draw in advance on time they have not yet accrued. Whatever you decide to do, document your policy and the time frame in which it will be in place, and communicate to your employees. Also, consider leniency on attendance policies for the remainder of the year if your policy states something to the effect that only absences covered by allowed PTO are excused, and there are consequences for exceeding this. Life is going to continue to happen and employees may need considerations, and how you have treated them during this difficult time will greatly influence how they view you as an employer, and whether or not they stay.

HOW CAN WE MEET OUR BUDGET AND QUOTAS NOW THAT WE'VE BEEN OUT FOR SO LONG RUNNING UNDER CAPACITY?

Whether you have employees who must meet a sales quota for commission, a manufacturing line that must meet production numbers, or a design team that must meet deadlines, there are going to questions about how we play catch up as we wind things back up to normal business. The short answer is you aren't likely to meet the same goals in the same manner you did before. The long answer is you can still meet critical goals with some adjustments and revisions to the process. Just remember that revisions will be important to help your employees feel that they are attainable, especially coming back after a crisis. While you can still have goals be a stretch, you need to make sure that they take into consideration what is possible with a still reduced workforce (everyone might not come back at once), potential slower delivery on goods, and time that has been lost.

MANAGER QUESTIONS TO ANTICIPATE

CAN AN EMPLOYEE REFUSE TO RETURN TO WORK ONCE OUR RESTRICTIONS TO SHELTER IN PLACE HAVE BEEN LIFTED?

According to OSHA, employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13 (a) of the Occupational Safety and Health Act (OSH Act) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be

eliminated through the enforcement procedures otherwise provided by this Act.” OSHA discusses imminent danger as where there is “threat of death or serious physical harm,” or “a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.” The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Requiring employees to work with patients in a medical setting without PPE at this time may rise to this threshold. Most work conditions in the United States however, do not meet the elements required for an employee to refuse to work.

You should follow guidance issued by the CDC and OSHA to ensure employees are not in imminent danger, and make sure you are communicating to your employees what is in place for their safety. Once again, this guidance is general, and you must determine when this unusual state exists in your workplace before determining whether it is permissible for employees to refuse to work.

In addition, Section 7 of the National Labor Relations Act (NLRA) extends broad statutory protection to those employees (in union and non-union settings alike) to engage in “protected concerted activity for mutual aid or protection.” Such activity has been defined to include circumstances in which two or more employees act together to improve their employment terms and conditions, although it has been extended to individual action expressly undertaken on behalf of co-workers. On its own website, the National Labor Relations Board (NLRB) offers a number of examples, including, “talking with one or more employees about working conditions,” “participating in a concerted refusal to work in unsafe conditions,” and “joining with co-workers to talk to the media about problems in your workplace.” Employees are generally protected against discipline or discharge for engaging in such activity.

Keep in mind that if you terminate an employee who refuses to work, even where there is no imminent danger to your employees, the employee may still file an OSHA whistleblower claim. If you can establish that there was no hazard to your employees by your company’s compliance with OSHA and CDC guidelines, the whistleblower claim likely will be dismissed.

WHAT IF THEY ARE IN A HIGH-RISK CATEGORY?

Again, the “imminent danger rule” applies, but be sure to follow the guidelines under the phases of the “Opening Up America Again”. The plan recommends that, during Phases One and Two, vulnerable individuals continue to shelter in place, which suggests that an elderly employee could refuse to return to a worksite during these phases. The plan recommends that during Phase Three, vulnerable individuals can return to work, but should practice physical distancing.

WHAT IF I HAVE AN EMPLOYEE WHO REFUSES TO WEAR THE ISSUED PPE, SUCH AS A FACE MASK?

Wearing the required PPE during this time can be a condition of employment. OSHA’s respiratory protection standard makes it clear that when a respirator is not necessary to protect the health of an employee, it is within the discretion of the employer to allow employees to use a respirator.

However, if an employee advises that he or she has a medical condition that prevents him or her from wearing a piece of PPE, you should engage in the ADA required interactive process with this employee to determine what reasonable accommodation can be made.

WHAT IF I THINK AN EMPLOYEE IS SHOWING SYMPTOMS, BUT THEY SAY THEY ARE NOT AND REFUSE TO LEAVE THE WORKPLACE?

You should first take a collaborate and cooperative approach. Remind the employee that you are asking them to leave. Try to make them understand the reasons why their departure is necessary to maintain the health and safety of the entire workplace. If there are benefits available — such as paid sick leave, use of accrued vacation, or something else that may appease them — you should explain these benefits and how the employee can use them.

If they remain uncooperative, you can tell them it is condition of their continued employment to follow the guidelines that have been put in place for safety, and this includes providing a release to work statement for employees who are symptomatic.

If the employee still refuses to leave the workplace, you can consider (a) explaining that the employee is now trespassing on private property and if they do not leave you will be forced to call local law enforcement to escort them off the premises; or (b) terminating the employee for insubordination. Termination of the employee, however, should be considered a last resort.

WE'RE DOING REVIEWS, AND BOB JONES DID NOT SEEM AS COMMITTED TO WORKING DURING THE CRISIS AS JIM SMITH. SMITH TOOK OFF 10 DAYS SICK LEAVE TO GET CHILDCARE ARRANGEMENTS MADE, BUT JONES TOOK SICK LEAVE AND DOESN'T HAVE KIDS. I DON'T THINK JONES WAS REALLY SICK AND JUST WANTED THE TIME OFF. CAN I TALK ABOUT THIS IN THE REVIEW?

A lot of managers are going to have a lot of different views about who stepped up in this crisis and who didn't, and many of these employees who did go above and beyond can and should be recognized. However, the paid sick leave under the FFRCA was a mandated benefit provided to all employees in companies with fewer than 500 employees. You cannot retaliate against someone for taking advantage of this benefit, regardless of whether it was for personal illness, recommended quarantine, or childcare.

WHAT IF MY EMPLOYEES DON'T WANT TO COME BACK BECAUSE THEY ARE MAKING MORE ON UNEMPLOYMENT?

While the increase in unemployment is much needed, it can also be a challenge now that there are employees who make more on unemployment than with their regular weekly wages. The \$600 additional per week is equal to \$15/hr.; add that to the benefit they would have normally received, and many low-income employees are making more on the unemployment benefit. However, this is short term thinking, and employees who are engaged in their jobs will be ready to come back to work to continue to invest in their career. (Again, this is where to consider how you treat your employees – have you made them want to come back to work to fulfill your business goals for the long haul, or is the prospect of staying on unemployment and potentially losing their current job with you more enticing because they do not feel valued?) You may also have some employees who face this hard decision because their spouse is also off work but not eligible for unemployment (while employees don't have to look for work during the current provisions, they have to be ready and able to work; an employee who is sick is not, and will likely not receive benefit). Be understanding with your employees, and place expectations on what can and cannot be done to retain their positions.

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Sources: www.cdc.com; www.osha.com; www.fisherphillips.com